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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF.

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REPLY AND SUPPLEMENTAL BRIEF.

On May 7, 1982, petitioner filed a petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in *Todd v. McNeff*, 667 F.2d 800. On June 15, 1982, respondent filed a brief in opposition. Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, petitioner hereby files this reply brief to respondent's brief in opposition.

After the petition was filed, this Court issued its decision in *Woelke & Romero Framing, Inc. v. N.L.R.B.*, ... U.S. ...., 50 USLW 4538 (May 24, 1982). Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, petitioner hereby files this supplemental brief to comment on this new case.

The Decision Below Conflicts With This Court's Decision in *Woelke & Romero Framing, Inc. v. N.L.R.B.*, ... U.S. ...., 50 USLW 4538 (May 24, 1982).

In *Woelke & Romero*, this Court held that the construction industry proviso to Section 8(e) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(e), shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship.

This Court acknowledged that this encourages top-down organizing even though "one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns." *Woelke & Romero*, 50 USLW at 4543. However, this Court was quick to point out that this exception was limited and delineated several safeguards against other types of top-down organizing:

> When a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement — known as a prehire agreement — with the union. If they do so, however, § 8(f) expressly states that their employees may challenge the union's representative status by filing an election petition with the Board. And the subcontractors themselves, if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the agreement *at any project* on which the union has not demonstrated that it represents a majority of their employees. See *NLRB v. Local 103, Iron Workers*, 434 U.S. 335 (1978); *Giordano Construction Co.*, 256 NLRB No. 10 (May 18, 1981), 107 LRRM 1164, 1165-1166. (Emphasis added) *Woelke & Romero*, 50 USLW at 4543.

By adopting the decision of the National Labor Relations Board ("Board") in *Giordano Construction Co.*, this Court again adopted the Board's interpretation of national labor policy concerning the statutory construction of Section 8(f) of the Act. Not only does a union have to establish majority support to enforce an 8(f) prehire agreement, it must do so at *each project* if the employer does not "have a stable workforce" which stays with the employer from job to job.

This Court has thus adopted the Board's position that employers and unions are free to utilize the procedures of Section 8(f) to obtain union-referred workmen on certain jobsites but that such a practice does not bind the employer to the terms of the agreement on jobsites where the employees selected do not wish union representation.[1]

These "union" and "non-union" jobsites can, and do, exist at the same time. The decision of the Court below does not allow for this jobsite by jobsite approach adopted by the Board and this Court. The Court below held that an employer must notify the union that it is repudiating the agreement before such a minority agreement would be held unenforceable. This "all or nothing" approach is based on an analysis which does not accept the Board's position, adopted by this Court, that an 8(f) agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 at 345 (1978).

Despite the assurances of this Court in *Woelke & Romero* that top-down organizing is limited by safeguards under Section 8(f) of the Act, minority prehire agreements are, nevertheless, being enforced, in varying degrees, in the

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[1]The Board articulated this policy in its decision in *Dee Cee Floor Covering, Inc.*, 232 NLRB 421.

Eighth, Ninth and Tenth Circuits. This Court should take this opportunity to restore the safeguards assured construction employees and employers in this Court's *Woelke & Romero* decision.

Reply to Respondent's Brief in Opposition.

Respondent presented the issue to this Court of whether an 8(f) agreement was void if a contractor signed an agreement to remain eligible for work "where the general contractor and the union had agreed to a union signatory subcontracting clause." Respondent's Brief in Opposition, page i. Respondent also alleged that McNeff, Inc. signed the agreement in issue to remain "eligible for work as a subcontractor for a general contractor with a union signatory subcontracting agreement." Respondent's Brief in Opposition, page 5.

It is respectfully submitted that there is no evidence in the records of this case that the general contractor involved had agreed to a union signatory subcontracting clause and petitioner is not aware of such a fact. In any event, this Court need not decide whether the conduct of the union involved amounted to coercion because the matter was not resolved in the first instance by the Court below. This Court also need not pass on what conduct constitutes coercion sufficient to destroy the voluntary adherence to Section 8(f) agreements required by this Court in *Higdon*. The only issue before this Court, in this regard, is whether the Court below, as a matter of law, properly refused to decide the factual issue.

Respondent also attempted to reconcile the decision of the Court below with the decision of the Board's General Counsel not to proceed on the same set of facts under Section 8(a)(5) of the Act as "entirely consistent" positions. Respondent argued that the issues presented to this Court

in *Higdon* involved Board unfair labor practice proceedings and that such issues are "materially different" from the question of whether a Section 8(f) minority agreement "is judicially enforceable in a Section 301 action." Respondent then stated that the Court below "recognized this distinction" and intended minority Section 8(f) agreements to be enforceable under Section 301 despite the refusal of the Board to enforce them in unfair labor practice proceedings. Respondent's Brief in Opposition, pages 11-12.

The Court below recognized no such distinction. This rationale was used only by the Courts of Appeals for the Eighth and Tenth Circuits. The Court below specifically rejected the approach, stating:

> There is no reason to restrict the statements in *Higdon* about § 8(f) agreements generally to unfair labor practices cases. The opinion is written much more broadly than that view allows. *Todd v. McNeff*, 667 F.2d at 803.

The Court below simply formulated its own version of national labor policy by adopting policies which have been rejected by the Board.

Respondent's attempt to justify the maverick decision of the Court below by superimposing the rationale of the Eighth and Tenth Circuits, actually highlights the conflict in the Courts of Appeals[2] and the conflict between the Board and the Court below.

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[2]Respondent further acknowledged the conflict in the Courts of Appeals when it noted the conflicting view of the Court of Appeals for the Fifth Circuit and simply labled that Court's decision as "erroneous". Petitioner's Brief in Opposition, page 9, note 2.

Conclusion.

Based on the foregoing the writ of certiorari should be granted.

Los Angeles, California.

Dated: June 24, 1982.

Respectfully submitted,

JAMES T. WINKLER,

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Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2150

JIM MCNEFF, INC.,

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FRANK L. TODD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Building and Construction Trades Department, AFL-CIO, hereby move for leave to file a brief *amici curiae* in the above-styled case in support of the position of respondents.

The AFL-CIO is a federation of 99 national and international unions having a total membership of 14,500,000

working men and women. The Building and Construction Trades Department, AFL-CIO, is composed of 15 national and international unions representing 4,000,000 construction workers. This case raises the question of whether "prehire" agreements expressly made lawful in the construction industry by § 8(f) of the National Labor Relations Act, as amended, are enforceable in court or are, as the petitioner contends, without any binding effect. In practical terms, as this case shows, resolution of that question will determine whether or not employers are free, after labor has been performed under a § 8(f) agreement, to reneg on their promise to pay for that labor as provided in the agreement. Thus, the issue presented here is of substantial moment and it is for that reason that the AFL-CIO and the Building Trades Department, AFL-CIO, seek leave to state their views.

The correct interpretation of the Act in our view is that a § 8(f) agreement is binding until it has been terminated by the union's loss of the election authorized in the proviso to § 8(f). As we show in the attached brief *amici curiae*, the alternative view which would allow a party to abrogate the prehire agreement merely by so notifying the other party has no basis in the statutory language, and is contrary to the purposes of both § 8(f) and § 301. Petitioner resists enforcement of the agreement also on the ground that he entered into it under "duress." But, as we also show, the § 8(f) agreement here was entered into under conditions envisioned and privileged by Congress, as confirmed by this Court's decision in *Woelke & Romero, Inc. v. NLRB*, —— U.S. ——, 50 L.W. 4538 (May 24, 1982).

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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